



**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**Case No. EA/2011/0209**

**ON APPEAL FROM:**

The Information Commissioner's  
Decision Notice No: FS50328160  
Dated: 18 August 2011

**Appellant: JULIA MARTYRES**

**Respondent: INFORMATION COMMISSIONER**

**Additional Party: NHS CAMBRIDGESHIRE**

**On the papers at  
Field House on: 19 DECEMBER 2011**

**Date of decision: 11 JANUARY 2012**

**Before**

**Robin Callender Smith**  
Judge

and

**Elizabeth Hodder and Alison Lowton**  
Tribunal Members

**Representations:**

For the Appellant: Arnold and Julia Martyres  
For the Respondent: Richard Bailey, Solicitor for the Information Commissioner  
For the Additional Party: Alan Mack, NHS Cambridgeshire

**Subject matter:**

**FOIA**

Absolute exemptions

- Information accessible by other means s.21
- Personal data s.40
- Confidential information s.41

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 18 August 2012 and dismisses the appeal.

**REASONS FOR DECISION**

**Introduction**

1. On 27 September 2009 the Appellant, Mrs Julia Martyres, asked for all the information held by the Second Respondent, NHS Cambridgeshire (and its relevant community services provider), in respect of her deceased mother who had died on 29 August 2009 including information about the care received by her mother at a care home she was staying at prior to her death.
2. The Appellant and her husband have contested the last will made by the Appellant's mother by entering a caveat dated 23 February 2010 and there is a formal probate claim in respect of the will in the Chancery Division of the High Court. The Appellant's two younger sisters are named as executors and trustees in that contested will.
3. The Appellant argues that she has a "claim arising from a patient's death" and that she should be given access to her late mother's healthcare files under the provisions of the Access to Health Records Act 1990. She also sought the information under the provisions of the Freedom of Information Act 2000 and the Data Protection Act 1998.
4. The original request was made to NHS Cambridgeshire who responded, as the primary care trust, in October 2009. At that time Cambridgeshire Community Services (CCS) was the provider arm of NHS Cambridge. On

1 April 2010 CCS became a freestanding trust in its own right as the Cambridgeshire Community Services NHS Trust and established its own FOI policy. It provided the formal internal review on 30 July 2010 and holds the relevant care file.

5. The Second Respondent confirmed that it held information relevant to the request but refused to disclose it, relying on s.41 (1) of FOIA.

#### The complaint to the Information Commissioner

6. The Appellant complained to the Information Commissioner (IC) on 5 August 2010 challenging the decision to withhold the requested information and, in the Decision Notice dated 18 August 2011 (FS5032 8160) found that the Second Respondent was correct in its application of s.41 (1) FOIA.

#### The appeal to the Tribunal

7. The Appellant believes the IC erred in concluding that the disputed information was exempt under s.41 FOIA as no actionable breach of confidence would arise from the disclosure of the information.
8. The Appellant also contends that the IC should have found that the exemption under s.21 was engaged on the basis that "as next of kin and nearest relative" she would have been entitled to obtain the disputed information requested via the Access to Health Records Act 1990.
9. The Appellant further contends that the IC should have considered that the disputed information was exempt under s.40 of the Act and that he failed to use his administrative discretion.
10. The Appellant maintains that the issue of the balance of confidentiality of the disputed information as against the Appellant's duties and statutory responsibilities under the Mental Health Act 1983 – as the deceased's next of kin and nearest relative – raised issues about the rights of both mother and daughter under Article 6 and Article 8 ECHR.

### The questions for the Tribunal

11. The Tribunal has to consider whether the exemption in s.41 FOIA was correctly engaged and applied by both the Second Respondent and the IC.
12. A subsidiary consideration is whether the IC should have found that the exemption under s.21 should have been engaged on the basis that the Appellant would have been entitled to obtain the information requested via the Access to Health Records Act 1990 on the basis that she held the status of "nearest relative" in respect of her late mother under the provisions of the Mental Health Act 1983.

### Evidence

13. While the Tribunal has been provided, in a closed and confidential bundle, with the information requested by the Appellant it has not found it necessary to refer to this information in arriving at its unanimous decision.
14. The Tribunal has considered all the submissions and admissible information provided by the Appellant.

### Legal submissions of the Appellant

15. The Appellant maintains that the appeal revolves around the fact that the Second Respondent failed to conduct enquiries to establish the identity of the personal representative, executors, and trustees and failed to validate the Joint Ordinary Power of Attorney dated 13 July 2004 and validate the Will dated 13 September 2007.
16. The Appellant disputes the IC's "creative" interpretation of Section 3 (1) (f) and Section 5 (3) and Section 5 (4) of the Access to Health Records Act 1990 "bearing in mind that the Appellant is the next of kin, proposed executor and trustee of one of the Wills and has a valid claim against her

mother's estate under the intestacy rules. The definition of the word 'claim' is a major issue."

17. The Appellant seeks to distinguish the Tribunal decision in *Bluck v IC and Epsom & St Helier University Hospitals NHS Trust* (EA/2006/0090) and the IC's Decision Notice FS50101567 *East London & the City Mental Health Trust*, urging the Tribunal to consider its decision in *Higher Education Funding Council for England v IC* (EA/2009/0036) as more relevant in terms of the operation and application of the s.41 exemption.
18. In terms of Article 6 and Article 8 ECHR issues, the Appellant argues that what needs to be considered is whether the Appellant's late mother's best interests are best preserved by maintaining the confidentiality of her personal information when set against reconciling the Appellant's duties and statutory responsibilities – as her late mother's nearest relative – in having access to enough information about her mother to exercise of statutory functions under the Mental Health Act.

#### Conclusion and remedy

19. The Tribunal reminds itself that Section 41 (1) FOIA states that information is exempt if (a) it was obtained by the public authority from any other person and (b) the disclosure of the information to the public authority holding it would constitute a breach of confidence actionable by that or any other person.
20. It is clear that the information in question was obtained from another person (social care professionals) and that the information possesses the necessary quality of confidence.
21. The Tribunal has no difficulty in deciding, to the required standard (the balance of probabilities), that disclosure of the information would constitute such an actionable breach of confidence. The Tribunal finds that this information would only have been provided to the Second

Respondent in the expectation that the information would be held by the Second Respondent in confidence.

22. Any disclosure by the Second Respondent of the disputed information would be an actionable breach of confidence owed to the social care professionals.
23. The Access to Health Records Act 1990 – and Section 3 (1) (f) – relates to applications for access to a health record which may be made to the holder of the record by (where patient has died) the patient's *personal representative* and any person who may have a claim arising out of the patient's death.
24. In the definition section of the Access to Health Records Act (Section 1 (1)) a "health record" is defined as a record which "consists of information relating to the physical or mental health of an individual who can be identified from that information, or from that and other information in the possession of the holder of the record; and has been made by or on behalf of a health professional in connection with the care of that individual".
25. On the basis that the term "health professional" under the Access to Health Records Act has the same meaning as in the Data Protection Act 1998 it is clear to the Tribunal that social care professionals do not fall within the list of health professionals under Section 69 of the Data Protection Act.
26. The Second Respondent confirmed that the information held had not been prepared by or on behalf of a healthcare professional. The Tribunal finds that the Appellant would not have been able to obtain the disputed information from the Second Respondent under the Access to Health Record Act and that the IC was correct to conclude that the disputed information was not reasonably accessible by other means resulting in the fact that the exemption under s.21 (1) FOIA would not be engaged.

27. The Tribunal finds no merit in the Article 6 and Article 8 ECHR arguments proposed by the Appellant.
28. The Appellant would appear to be trying to use the FOIA information request to boost issues within the Chancery Division of the High Court in relation to disputes about her late mother's will. It is not the function of the Tribunal to do more than consider the correct application of the exemption claimed by the Second Respondent and reviewed by the IC in his decision notice.
29. It is not the function of the Tribunal to seek to exercise any exploratory or disclosure powers that may (or may not) be available as a result of the Probate Caveat in the Chancery Division.
30. The Tribunal finds no equivalence between the "nearest relative" concept from the Mental Health Act and the "Personal Representative" concept that exists in probate matters and which is also expressed in the Access to Health Records Act.
31. If the Access to Health Records Act had wished to incorporate the "nearest relative" concept from the Mental Health Act 1983 then it could have done so clearly and specifically because the "nearest relative" concept had been in existence since 1983, several years before the Access to Health Records Act 1990.
32. For all these reasons the Appellant's appeal cannot succeed.
33. Our decision is unanimous.
34. There is no order as to costs.

Robin Callender Smith  
Tribunal Judge  
11 January 2012





**IN THE FIRST TIER TRIBUNAL  
(INFORMATION RIGHTS)**

**RULING on an APPLICATION for PERMISSION to APPEAL**

**By**

**Mrs Julia Martyres**

1. This is an email application dated 19 January 2012 on behalf of Mrs Julia Martyres for permission to set aside and/or to appeal part of the decision of the First Tier Tribunal (Information Rights) (“FTT”) dated 9 January 2012. That decision dismissed the appeal of Mrs Julia Martyres and upheld the Information Commissioner’s (IC) Decision Notice dated 18 August 2011.
2. The right to appeal against a decision of the FTT is restricted to those cases which raise a point of law. The FTT accepts that this is a valid application for permission to appeal under rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended (“the Rules”).
3. The FTT has considered whether to review its decision under rule 43(1) of the Rules, taking into account the overriding objective in rule 2, and has decided not to review its decision because the grounds of the application do not raise an error of law for the reasons stated below.
4. The Appellant contends that:
  - (1) The findings of the Appeal Decision are not appropriate / proportionate and need to be reconsidered.
  - (2) That the Tribunal’s interpretation of Section 21, Section 40, Section 41 of the Freedom of Information Act 2000 and also Section 3 (1) ( f ) of the Access to Health Records Act 1990 is incorrect.
  - (3) That key information was withheld from the Appellant, the Information Commissioner and the Tribunal by the Second Respondent specifically a document titled National Health Service Act 2005, Section 75 Partnership Agreement, Integrated Provision for Older Peoples Service, between Cambridgeshire County Council and NHS Cambridgeshire. That Agreement provided evidence beyond any reasonable doubt that the data requested by the Appellant was created solely by NHS Cambridgeshire and not obtained from a third party.
5. Having reviewed all the evidence and submissions – closed and open - presented by all the parties in this appeal the Tribunal Judge considers the findings:
  - (1) were appropriate and proportionate;
  - (2) that the Tribunal’s interpretation of and conclusions about the effect of the relevant Statutes was correct and raise no obvious or manifest errors of law; and that
  - (3) no key information was withheld from the Tribunal.
6. It follows that the appeal has no prospect of success and that permission to appeal is refused.

Robin Callender Smith  
Tribunal Judge  
First-tier Tribunal (Information Rights)  
31 January 2012